

D. Hasfurther



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Trail Equipment Company

File: B-241004.2

Date: February 1, 1991

W.C. Jolly for the protester.
Allen W. Smith, United States Forest Service, for the agency.
David Hasfurther, Esq., and Michael R. Golden, Esq., Office of
the General Counsel, GAO, participated in the preparation of
the decision.

DIGEST

1. Where bidder's descriptive literature, submitted to establish the compliance of its offered equal product with the salient characteristics for the brand name or equal procurement, takes exception to various salient characteristics, the bidder's bid was properly rejected as nonresponsive, and neither an alleged blanket promise of compliance nor any monetary savings that the bid offered can cure its nonresponsiveness.

2. Where literature submitted by a bidder offering the brand name product indicates that product as offered does not comply with one of the salient characteristics for the product being purchased, the bid is nonresponsive and may not be cured after bid opening.

DECISION

Trail Equipment Company (TEC) protests the rejection of its low bid as nonresponsive under invitation for bids (IFB) No. R6-18-90-277, issued by the United States Forest Service, Department of Agriculture, for the purchase of a Gradall model 660E or equal multipurpose hydraulic excavator. TEC also protests any award to Sahlberg Equipment, Inc., because that bidder was permitted to render its allegedly nonresponsive bid responsive by an improper substitution of the engine it was proposing after bid opening.

We deny TEC's protest against the rejection of its bid and sustain the protest against acceptance of Sahlberg's bid.

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The IFB requested prices for supplying the brand name excavator or its equal, three specified attachments for the excavator, an extended warranty, and a trade-in allowance for a 1977 Gradall excavator belonging to the agency. A bidder offering an equal excavator was required by the IFB Descriptive Literature clause to submit sufficient literature with its bid to permit the agency to establish that the product offered complied with the minimum technical requirements (salient characteristics) set out in the IFB Technical Specifications clause. Bidders were advised that a failure to establish compliance with the minimum technical requirements through the submitted descriptive literature would result in bid rejection. On the IFB page included for inserting the brand/model and the manufacturer of any "equal" product offered, bidders were advised that "Failure to designate the intended 'equal' obligates the bidder to furnish the specified 'brand name'."

Two bids were received in response to the IFB. TEC's total bid price of \$161,310 was based on supplying an equal product, the Badger Construction Equipment Co. model 666. Sahlberg's total bid price was \$166,660. Sahlberg bid the brand name excavator. Both bidders submitted descriptive literature. The agency's evaluation of the descriptive literature provided by TEC for its offered equal product showed that the IFB salient characteristics were not met by the Badger excavator. The Badger model had a wheel base of 150 inches rather than the required 170-180 inches, a gross vehicle weight rating of 52,000 pounds rather than the required minimum 58,000 pounds, an upper structure of the engine which provided 162 gross horse power (GHP) instead of a minimum of 170 GHP, an upper structure fuel tank capacity of 50 instead of 100 gallons, a rear axle minimum capacity of 40,000 rather than 46,000 pounds, and hydraulics with a fixed flow output of 110 gallons per minute (GPM) at 25,000 revolutions per minute rather than the required minimum of 136 GPM. Further, numerous salient characteristics were not addressed by TEC's descriptive literature. TEC's bid subsequently was rejected as nonresponsive because the descriptive literature submitted with it to establish the acceptability of TEC's offered equal product either took exception to, or failed to provide information on, various salient characteristics that the IFB required an offered equal excavator to meet. The agency made a determination to award the contract while the protest was pending.

TEC concedes that its descriptive literature does not indicate complete compliance with the technical specifications. It asserts, however, that the specifications call for many items that are optional equipment and that the literature it submitted, just as the literature of any manufacturer TEC is familiar with, does not list all the options available with

this product. TEC argues that by inserting the notation "C-2" (the designation for the IFB clause dealing with the "Technical Specifications") in the blank after the words "Specification No." on the IFB page provided for designating the equal product being offered, it intended to, and believes it did, confirm that its proposed equal product complied with the IFB specifications in all respects. It states that the contracting officer agreed, when requested prior to TEC's submission of its bid, that "C-2" should be inserted in this blank. Further, it argues that since the contracting officer had previously amended the specifications prior to bid opening to permit TEC to bid the Badger model 666, he knew that the product TEC was offering complied fully with the specifications. In any event, TEC believes its bid should be accepted because of the monetary savings its bid represents.

We agree with the agency's determination to reject the TEC bid as nonresponsive. To be responsive to a brand name or equal solicitation, a bid offering an equal product must conform to the salient characteristics of the brand name product listed in the solicitation. A bidder must submit with its bid sufficient descriptive literature to permit the contracting agency to assess whether the equal product meets all the salient characteristics specified in the solicitation. Tri Tool, Inc., B-233153, Jan. 25, 1989, 89-1 CPD ¶ 84. If the literature submitted with the bid, and any other information available to the contracting agency, does not show compliance with the solicitation salient characteristics, the bid must be rejected. AZTEK, Inc., B-229897, Mar. 25, 1988, 88-1 CPD ¶ 308. It is clear that the literature submitted with TEC's bid both took exception to, and failed to show compliance with, various of the salient characteristics. TEC admits this is the case.

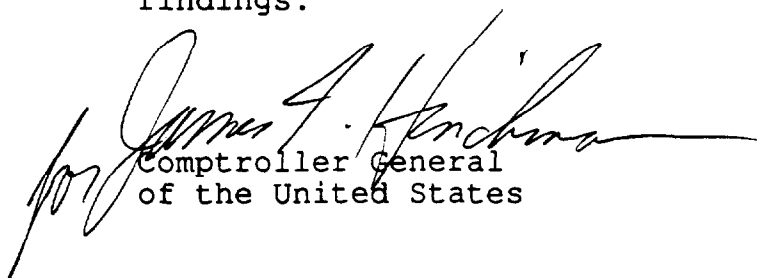
TEC's contention that its insertion of the notation "C-2" on the page for certification constituted a promise that its product conformed with all requirements does not change our conclusion. A blanket promise of compliance with the solicitation's specifications is not enough to establish a bid's responsiveness. Rather, the bidder must have affirmatively demonstrated the compliance of its product on the basis of the descriptive literature. BRS & Assocs., Inc., B-236883, Dec. 11, 1989, 89-2 CPD ¶ 539. Finally, a nonresponsive bid may not be accepted even where it might result in monetary savings to the government since acceptance would compromise the integrity of the sealed bidding system. Medical Depot Supplies Corp., B-239342, Aug. 22, 1990, 90-2 CPD ¶ 149. TEC's protest against the rejection of its bid is denied.

TEC also argues that Sahlberg's bid should have been rejected as nonresponsive for failing to meet the requirement that the engine have compression braking capability equal to a "Jake

Brake" and that the agency improperly allowed Sahlberg to substitute after bid opening an engine not contained in the descriptive literature furnished. Sahlberg submitted literature describing the brand name Gradall 660E excavator it was offering. The literature showed the excavator would have an undercarriage Cummins 6CTA8.3 engine. Sahlberg confirmed this in writing in subsequent correspondence to the agency prior to award. TEC advised the agency that Cummins had reported it would not approve the installation of the "Jake Brake" and thus the Sahlberg product did not comply with the salient characteristic for brakes. The agency did not reject the Sahlberg bid but rather allowed the bidder prior to award to substitute the Cummins L10 engine, which will permit compliance with the "Jake Brake" requirement. The engine was not listed in the descriptive literature furnished by Sahlberg and is inconsistent with the subsequent confirmation of its bid.

We conclude that award to Sahlberg was improper. The agency has admitted that Sahlberg will supply a Cummins L10 engine as part of the Gradall excavator undercarriage. This engine was not listed in the literature Sahlberg submitted with its bid. Although the L10 engine will meet the "Jake Brake" requirement in the salient characteristics, it is not disputed that the Cummins 6CTA8.3 engine set out in the literature would not. The agency thus improperly allowed Sahlberg's nonresponsive bid to be cured after bid opening by permitting it to substitute an engine meeting the IFB requirement. Responsiveness must be determined at the time of bid opening and, in general, solely from the face of the bid and material submitted with the bid. Nonresponsiveness cannot be cured after bid opening. To allow a bidder to make its nonresponsive bid responsive after bid opening, which the agency permitted here, is tantamount to allowing the bidder to submit a new bid. Morey Mach., Inc., B-225367, Dec. 12, 1986, 86-2 CPD ¶ 672; Harnischfeger Corp., B-220036, Dec. 19, 1985, 85-2 CPD ¶ 689. The protest is sustained.

Ordinarily, since both bids were nonresponsive, resolicitation would be appropriate. However, since performance of this contract has occurred, we find the protester entitled to the costs of filing and pursuing its protest, including attorneys' fees, if any. 4 C.F.R. § 21.6(d)(1) (1990). By letter of today, we are advising the Secretary of Agriculture of our findings.


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